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Supreme Court, U.S.
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No. 03-1427

IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS USA INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONERS' REQUEST FOR GVR

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PRELIMINARY STATEMENT

Petitioners requested that this case "be held pending this Court's disposition of *United States v. Pasquantino*, No. 03-725, and upon the disposition of that case, the Court should grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration" Pet. at 27; *accord id.* at 8-11.

On April 26, 2005, the Court issued *Pasquantino*. *See Pasquantino v. United States*, 544 U.S. __ (2005). It is abundantly clear that the decision provides no reason for a GVR in this case and that this Court should now deny the petition outright. This Court in *Pasquantino* specifically stated that it "express[es] no view" on the precise question presented by this case: "whether a foreign government .. . may bring a civil action under [RICO] for a scheme to defraud it of taxes." *Pasquantino*, slip op. at 3 n.1. Nothing in *Pasquantino*, therefore, is contrary to the Second Circuit's decision below. Indeed, the opposite is true: the reasoning of *Pasquantino* is consistent with that of the Second Circuit, which expressly held that the Revenue Rule does not apply to criminal prosecutions like the one in *Pasquantino*, but does apply to civil lawsuits brought by foreign sovereigns. *See* App. 14a. The Second Circuit's holding is also consistent with the position of the United States, which in *Pasquantino* relied on the distinction between civil and criminal cases and agreed that the Revenue Rule bars civil RICO cases such as those here. *See* Brief for the United States at 15 n.4, *Pasquantino* (No. 03-725). A GVR would do nothing more than waste judicial resources and further delay this case unnecessarily.

PASQUANTINO HAS NO BEARING ON THIS CASE AND THE COURT SHOULD DENY THE PETITION AND NOT GVR

A GVR may be appropriate where "[1] recent developments that we have reason to believe the court below did not fully consider, [2] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where ... redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *accord Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam). Given this Court's decision in *Pasquantino*, these criteria are not met here.

First, this Court's decision in *Pasquantino* presents no holding or legal analysis that qualifies as a "recent development" that the Second Circuit failed to consider below. As an initial matter, this Court was unequivocal in stating that it expressed "no view" on the application of the Revenue Rule in cases such as this – i.e., civil actions brought by foreign sovereigns to vindicate foreign revenue laws. *Pasquantino*, slip op. at 3 n.1. Therefore, this Court should not GVR this case because this Court simply did not address the question at issue here in *Pasquantino*.

Beyond that, the reasoning of this Court's *Pasquantino* decision is fully consistent with the application of the Revenue Rule in this case. In *Pasquantino*, this Court recognized that the unique characteristics of criminal cases, not present in civil cases, rendered the Revenue Rule inapplicable. The Second Circuit's interpretation of the Revenue Rule is completely in accord with this Court's holding. *See Pasquantino*, slip op. at 3 (noting that the Court was resolving split between the Second Circuit's decision in

Trapilo and the First Circuit's decision in *Boots*). As the Second Circuit explained, these unique characteristics prevent application of the Revenue Rule to criminal prosecutions, but have no application where, as here, a foreign sovereign brings a civil action to vindicate foreign revenue laws. App. 13a-14a.

For instance, this Court recognized that the Revenue Rule traditionally has not been interpreted as barring domestic criminal prosecutions, but rather, "prohibit[ed] the enforcement of tax liabilities of one sovereign in the courts of another sovereign. . . ." *Pasquantino*, slip op. at 10; *see also id.* at 13 ("The main object of the action in each of those cases was the collection of money that would pay foreign tax claims."). Thus, the Court's decision confirms the Revenue Rule's traditional application and is consistent with its application generally to civil cases like this one, where foreign sovereigns are seeking to vindicate their foreign revenue laws.

Further, this Court recognized that a criminal prosecution "poses little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns." *Id.* at 17. Criminal prosecutions do not pose such a risk because of the presence of the Executive Branch:

> But we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. We know of no common-law court that has applied the revenue rule to bar an action accompanied by such a safeguard, and neither petitioners nor the dissent directs us to any.

Id. at 18. The Second Circuit already considered this precise issue and recognized that, in a civil suit brought by a foreign sovereign, this "safeguard" does not exist. The Second Circuit thus concluded that in such a civil context the Revenue Rule serves essential separation of powers concerns:

> [C]laims by foreign sovereigns invoking their tax statutes may embroil the courts in an evaluation of the foreign nation's social policies, an inquiry that can be embarrassing to that nation and damaging to the forum state. Moreover, because the conduct of foreign relations is primarily the realm of the legislative and executive branches, judicial examination and enforcement of foreign tax laws at the behest of foreign nations may conflict with the other branches' policy choices. . . .

App. 13a (internal citations omitted). Indeed, in *Pasquantino* the United States also emphasized the crucial distinction between civil and criminal cases and took the position that the Revenue Rule bars civil RICO cases such as those here. *See* Brief for the United States at 15 n.4, *Pasquantino* (No. 03-725).

In short, there is no reason to GVR this case so that the Second Circuit can consider the distinctions between criminal and civil cases anew. The Second Circuit has already fully considered them in the decision below.

Second, there is no "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167. As noted, this Court interpreted the Revenue Rule in the same way that the Second Circuit interpreted it below. Nothing in *Pasquantino*

provides even a remote possibility – much less a "reasonable probability" – that the Second Circuit would reject its prior decision.

Finally, where "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. That is exactly the case here. Remanding this case for application under *Pasquantino* would simply require the Second Circuit to reconfirm its prior holding. A GVR here, therefore, would result only in delay and further cost. *See id.* at 174 ("Respect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket all counsel against undisciplined GVR'ing.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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